No. 34605-6-III

IN THE COURT OF THE APPEALS
OF THE STATE OF WASHINGTON

DIVISION III

THE STATE OF WASHINGTON, Respondent

v.

KYLE JOHNSON, Appellant.

BRIEF OF RESPONDENT

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PREFACE

The Appellant herein couches this latest appeal as an attack on the judgement and sentence entered more than twenty-six years ago. *See*: Appellant's Opening Brief, page 1. However, the majority the issues raised herein are actually attacks on the plea of guilty[1] - the subject of the first appeal which was conclusively decided by Division Three in 1992.

Rather than moving this Court for reconsideration of that decision, or bringing a second motion to set aside the plea in the trial court, the Appellant attempts to bootstrap these issues into this action. In so doing he offers no explanation why these matters should be reconsidered: no assertion of change of law, newly discovered evidence, or manifest error by the Court of Appeals some twenty-five years ago. Nor does he offer any explanation why the "time bar" on such motion would not be dispositive of his efforts.

This Court should not allow the Appellant to take this backdoor route to take a second bite at the apple. This appeal should be summarily denied.

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[1] The only claim which does not fit this characterization is the spurious assertion that the Appellant's arraignment was not conducted publically in open court. Appellant's Opening Brief, page 2.

I. STATEMENT OF THE CASE

On December 17, 1988, the Appellant, Kyle Johnson, assaulted two of the guards at the Asotin County Jail. (*See*: Information, *attached to* Respondent's Motion to Dismiss Appeal, *previously filed with the Court*). According to the Affidavit of counsel filed in support of the charges:

> [W]hen jail employees attempted to place the defendant into a hold cell, the defendant attacked them, punching them, tearing clothing, and breaking glasses and watches.

(*See*: Motion and Affidavit for Order Determining Probable Cause and Directing Issuance of Summons, *attached to* Respondent's Motion to Dismiss Appeal). After the charges were filed in this matter, the Appellant was subsequently charged with Aggravated Murder in the First Degree. (*See*: Mandate and Opinion, *attached to* Respondent's Motion to Dismiss Appeal). The Murder case was also resolved by a plea of guilty and was the subject of three direct Appeals (238954 filed in 2005 in Division III; 272621 filed in 2008 in Division III; and 274594 filed in 2008 in Division III), and three Personal Restraint Petitions (807817 filed in 2007 in the Supreme Court; 292789 filed in 2010 in Division III; and 851808 filed in 2010 in the Supreme Court).

In the present case, on October 8, 1989 the Appellant appeared in the Superior Court of Washington in and for Asotin County and pled guilty to two counts of Custodial Assault in cause number 89-1-00015-8. (*See*: Statement of Defendant on Plea of Guilty, *attached to* Appellant's Memorandum in Support Timeliness of Appeal, *previously filed with the Court*). This plea was the product of a written agreement with the State which was accepted by all parties and the Judge. (*See*: Plea Agreement, *attached to* Appellant's Memorandum in Support Timeliness of Appeal). The trial court engaged in a fairly standard colloquy with the Appellant concerning the plea agreement and the plea of guilty. (*See*: Verbatim Report of Proceedings, October 9, 1989, *attached to* Appellant's Memorandum in Support Timeliness of Appeal). The Appellant, in his pleadings, points out that the trial court informed the Appellant at the time of the plea that "there is no right to appeal from the plea of guilty." Memorandum in Support Timeliness of Appeal, page 1. The context of this statement is significant. Review of the transcript of the hearing leading up to that statement, reveals that the trial court judge was reading from the standard Statement of Defendant on Plea of Guilty form as promulgated by the Supreme Court of this state[2]:

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[2] *See*: Criminal Rule 4.2

> You understand that you have the right to a speedy and public trial by an impartial jury in the county where the crime is alleged to have been committed?
>
> . . .
>
> You have the right to remain silent before and during trial, and not to testify against yourself. The right to hear and question the witnesses who testify against you, and the right at trial to have witnesses testify for you, and those witnesses can be made to appear at no expense to you. That you are presumed innocent until the charges are proven beyond a reasonable doubt, or you enter a plea of guilty, and that you have the right to appeal a determination of guilt after trial.
>
> You understand that by entering a plea of guilty, you give up all those rights?

Report of Proceedings, at pages 7 - 8, *(attached to* Appellant's Memorandum in Support Timeliness of Appeal); (*cf.* Criminal Rule 4.2). Having read the printed warnings which appear in the Statement on Plea[3], almost word for word, the trial court then advised the Appellant, as does the form, that by entering a plea of guilty the Appellant would give up all of these rights. It was in this context that the Judge advised the Appellant that "There is no right to appeal from the plea of guilty." *Id.* The trial court continued sentencing in the matter to "the first law and motion day in March of 1990[.]" *Id.* at page 13.

On March 28, 1990, anticipatory to a motion to withdraw his guilty plea, the Appellant filed an affidavit with the trial court in support

[3] This language still appears in all printed Statements of Defendants on Plea of Guilty in use in every court in the state.

of such a motion. (*See*: Affidavit in Support of Motion, *attached to* Respondent's Motion to Dismiss Appeal). On May 24, 1990, the Appellant filed notice of hearing with the trial court on the yet-to-be filed motion to withdraw his plea of guilty to the Custodial Assault charges. (*See*: Notice of Hearing on Motion to Withdraw Guilty Plea, *attached to* Respondent's Motion to Dismiss Appeal). The motion to withdraw the plea was then filed on May 30, 1990. (*See*: Motion to Withdraw and/or Set Aside Guilty Plea Pursuant to Criminal Rule 4.2(a), *attached to* Respondent's Motion to Dismiss Appeal). Both the Defense and the State filed memoranda of law supporting their positions on the issue. (*See*: Memorandum in Support of Defendant's Motion to Withdraw Guilty Plea, *and* Memorandum in Opposition to Defendant's Motion to Withdraw Guilty Pleas, *attached to* Respondent's Motion to Dismiss Appeal).

On June 1, 1990, the Superior Court heard the motion and denied it. (*See*: Order on Hearing re: Withdrawal of Guilty Pleas by Defendant, *attached to* Respondent's Motion to Dismiss Appeal).

On June 8, 1990, Kyle Johnson, through his attorney, filed a Notice of Appeal challenging the trial court's denial of the motion to withdraw the guilty plea. (*See*: Notice of Appeal, *attached to* Respondent's Motion to Dismiss Appeal). None-the-less, the matter proceeded to sentencing and on June 28, 1990 the trial court sentenced the Appellant to 150 days incarceration on each count, to

run concurrently with each other and concurrent with any sentence in the pending Murder in the First Degree case against the Appellant. (*See*: Judgment and Sentence (Felony), page 3 of 4, *attached to* Respondent's Motion to Dismiss Appeal). This sentence was well within the standard range of three to eight months for the charges. *Id*. at page 2 of 4. The court did not impose any term of community supervision. *Id*.

The direct appeal to the Court of Appeals, Division III was assigned a COA number of 10920-8-III and the Appellant designated the entire record to the Court as Clerk's Papers. (*See*: Designation of Clerk's Papers, *attached to* Respondent's Motion to Dismiss Appeal). This included the Judgment and Sentence that had been entered in the matter: Index to Clerk's Papers *attached to Designation of Clerk's Paper supra* at page 3.

On July 21, 1992, Division Three of the Court of Appeals, in an unpublished opinion, held that the Appellant had "failed to carry his burden of demonstrating withdrawal of the guilty plea was necessary to correct a manifest injustice" and denied the appeal, affirming the trial court. (*See*: Mandate and Opinion, *supra*).

Almost twenty-four years after entry of the mandate, the Appellant filed a second notice of appeal with Court of Appeals. In so doing the Appellant made no mention that a direct appeal, as a matter

of right, had previously been filed in this case, and had been denied on its merits by the Court of Appeals.

The Appellant secured leave of the Court to proceed with the "untimely appeal" as a matter of right under the aegis of an assertion that the trial court had misled him into believing that he could not appeal his plea of guilty. *See*: Memorandum in Support Timeliness of Appeal, at page 3: "*It is not surprising that Johnson did not file an appeal until recently because a judge told him he did not possess that right.*" In fact, the Appellant HAD filed a timely appeal, **twenty six years ago**. Moreover, as is amply demonstrated by the multiple appeals and personal restraint petitions filed by the Appellant in regards to his Murder conviction, he was well advised concerning his appellate rights by his various attorneys.

The Appellant now, here in this latest appeal, asserts that his plea of guilty was invalid due to the trial court's failure to advise him of the possibility of community supervision. As with his prior appeal, he again asserts that the plea was invalid due to the failure of consideration supporting the plea agreement. The Appellant claims that the trial court's misstatement of the applicable standard range rendered the plea invalid. Finally, the Appellant asserts, without any support, that his arraignment was not conducted in public.

II. ISSUES

A. DID THE TRIAL COURT'S FAILURE TO ADVISE THE APPELLANT OF THE POSSIBILITY COMMUNITY SUPERVISION RENDER THE PLEA OF GUILTY INVOLUNTARY?

B. HAS THE CLAIM OF "ILLUSORY" CONSIDERATION IN REGARDS TO THE PLEA AGREEMENT BEEN CONCLUSIVELY CONSIDERED AND REJECTED BY THIS COURT?

C. DID THE TRIAL COURT'S MISSTATEMENT OF THE STANDARD RANGE HAVE ANY EFFECT ON THE VALIDITY OF THE PLEA?

D. DOES THE APPELLANT'S CLAIM OF A COURTROOM CLOSURE HAVE ANY SUPPORT IN THE RECORD SUCH AS WOULD PERMIT REVIEW HEREIN?

III. ARGUMENT

A. THE TRIAL COURT'S FAILURE TO ADVISE THE APPELLANT OF THE POSSIBILITY OF DISCRETIONARY COMMUNITY SERVICE WHEN NONE WAS IMPOSED DOES NOT RENDER THE PLEA INVOLUNTARY.

B. THE CLAIM OF "ILLUSORY" CONSIDERATION IN REGARDS TO THE PLEA AGREEMENT HAS BEEN CONCLUSIVELY CONSIDERED AND REJECTED BY THIS COURT IN THE PRIOR APPEAL.

C. THE APPELLANT WAIVED ANY RIGHT TO OBJECT TO THE TRIAL COURT'S MISSTATEMENT OF THE STANDARD RANGE.

D. THE APPELLANT'S CLAIM OF A COURTROOM CLOSURE UTTERLY LACKS ANY SUPPORT IN THE RECORD SO AS TO PERMIT REVIEW HEREIN.

DISCUSSION

A. THE TRIAL COURT'S FAILURE TO ADVISE THE APPELLANT OF THE POSSIBILITY OF DISCRETIONARY COMMUNITY SERVICE WHEN NONE WAS IMPOSED DOES NOT RENDER THE PLEA INVOLUNTARY.

The Appellant asserts that the sentencing judge failed to inform him that he could be required to serve community supervision following his term of incarceration. Appellant's Opening Brief, page 3. The Appellant concedes that no community supervision was imposed at the time of sentencing. *Id*. at page 6. None-the-less, the Appellant asserts that the judge's omission renders the plea involuntary.

As a preliminary matter, the Appellant offers no explanation why this issue was not raised in his prior appeal. As will be discussed more fully below, the doctrines of *res judicata* and "law of the case" should generally preclude consideration of this issue herein.

Further, in order to arrive at his stated position the Appellant first asserts, without even attempting to offer any legal support for his assertion, that the possibility of community supervision is a direct consequence of a guilty plea. To this end he cites to In re Pers. Restraint of Isadore, 151 Wn.2d 294, 88 P.3d 390 (2004). Appellant's Opening Brief, page 3. The important distinguishing factor he fails to recognize is that Isadore dealt with **mandatory community placement**, NOT **discretionary community supervision**. Isadore,

at 300 - 301. The Appellant cites to no case where **discretionary community supervision** (which was NOT even imposed in the Appellant's case) stands on the same footings as **mandatory community placement**. Rather, he tries to sidestep the issue by asserting: "By the same reasoning" the two are equivalent. Appellant's Opening Brief, page 3. This assertion and its "reasoning" are contrary to the law. The two are factually and legally distinct: mandatory community placement is a "direct consequence" of a plea, discretionary community supervision is a "collateral consequence."

While it is true that a defendant must be informed of all the direct consequences of pleading guilty before the court accepts his guilty plea, it is also well-settled law that a defendant need not be advised of all the possible collateral consequences of his plea. State v. Barton, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980). It is the very fact of the **mandatory** nature of community placement that makes it a "direct consequence of a guilty plea" as a matter of law:

> Mandatory community placement produces a definite, immediate and automatic effect on a defendant's range of punishment. . . . A defendant will definitely serve a full 12 months of mandatory community placement.

State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996). As Division Three so aptly explained:

> The distinction between direct and collateral consequences of a plea "turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment."

In re Pers. Restraint of Ness, 70 Wn. App. 817, 822, 855 P.2d 1191 (Div. III, 1993), *quoting* State v. Barton, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980). No case can be found where **discretionary** community supervision has been found to be a direct consequence of a guilty plea.

The fact that the Appellant was not informed that the sentencing court COULD impose discretionary community supervision, when none was imposed, does not render the plea involuntary or invalid in any way.

B. THE CLAIM OF "ILLUSORY" CONSIDERATION IN REGARDS TO THE PLEA AGREEMENT HAS BEEN CONCLUSIVELY CONSIDERED AND REJECTED BY THIS COURT IN THE PRIOR APPEAL.

The Appellant's next claims of error center on his assertion that the plea of guilty in this matter was the product of an "illusory" promise. Appellant's Opening Brief, page 7. In 1992 this very Court, Division Three of the Court of Appeals, specifically held that the plea agreement in this case was NOT based upon an "illusory promise":

> While the value of a promise to refrain from so using the conviction is speculative, it is not illusory.

Unpublished Opinion *attached to* Respondent's Motion to Dismiss Review page 5. Not only has this issue been factually rejected by this Court, but procedurally any attack on the validity of the consideration underlying the plea agreement should be barred as well. This very

issue has been previously raised, considered on its merits, and found lacking by this Court twenty-five years ago. Based upon the doctrine of *res judicata* and "law of the case" this Court should not allow the Appellant to re-litigate this issue once again:

> Where there has been a determination of the applicable law in a prior appeal, the law of the case doctrine ordinarily precludes redeciding the same legal issues in a subsequent appeal.

State v. Worl, 129 Wn.2d 416, 425, 918 P.2d 905 (1996); *see also:* State v. Peele, 75 Wn.2d 28, 30, 448 P.2d 923 (1968). It must be noted that the Appellant does not challenge the Court's prior finding in this regard, nor does he intimate that the ruling was clearly erroneous or that the application of law of the case would result in manifest injustice. Nor does he offer any "new evidence" to support this claim:

> It is also the rule that questions determined on appeal, or which might have been determined had they been presented, will not again be considered on a subsequent appeal if there is no substantial change in the evidence at a second determination of the cause.

Greene v. Rothschild, 68 Wn.2d 1, 7, 414 P.2d 1013 (1966). Again, the Appellant offers no explanation why his issues with the plea weren't raised in the initial appeal, or to the extent that they were, why this Court should now reconsider its determination of the matter in its 1992 decision.

Res judicata and "law of the case" serve to prohibit the Appellant from attempting to take a second bite at the apple after this Court conclusively ruled against him more than twenty-five years ago.

C. THE APPELLANT WAIVED ANY RIGHT TO OBJECT TO THE TRIAL COURT'S MISSTATEMENT OF THE STANDARD RANGE.

The Appellant next asserts that his plea was "infected by mutual mistake" because the sentencing judge stated that the Appellant was subject to a standard range of 3 - 8 months based upon an offender score of "1." Appellant's Opening Brief, page 9. As is the case with the two prior assignments of error, the Appellant again fails to offer any explanation why this issue was not raised in the prior appeal and why the Court should allow him to raise it herein.

As for the specifics of his argument it appears that the Appellant is mistaken. The written statement on plea of guilty did indeed provide that the standard range was 0 - 12 months based upon an offender score of "0." *Id.* at page 8; *see also*: Statement on Plea of Guilty, page 1, *attached to* Appellant's Memorandum in Support Timeliness of Appeal. However, the Judgment and Sentence in this matter correctly stated that the Appellant's offender score was "1"(no priors, but an "other current offense") and the correct standard range was 3 - 8 months of incarceration. *See*: Judgment and Sentence (Felony), page 2 of 4, *attached to* Respondent's Motion to

Dismiss Appeal. The trial court judge sentenced the Appellant to 150 days on each count, to run concurrently - for a total of 150 days. *Id.* at page 3 of 4. This sentence falls well within the appropriate range of three to eight months, and well within the misstated range of zero to twelve months.

This being the case, it is clear from the record that prior to imposing sentence the Appellant was informed of the correct standard range. His signature is affixed to the document that correctly states the offender score and standard range. *Id.* Further, the Appellant did not raise any objection to the prior misstatement of his range at the time of the plea, or move to withdraw his guilty plea based on the misstatement, nor did he raise any objection in this vein in his prior appeal. Generally the "law of the case" and *res judicata* should bar re-litigation of this claim herein. Specifically, the Appellant waived any right to appeal based upon the misstatement of his offender score and the corresponding standard range as a matter of law:

> Our Supreme Court recently held that a defendant waived his right to appeal his plea on the basis of a miscalculated offender score when he was informed of the miscalculation before sentencing and failed to object or move to withdraw his plea.

State v. Mendoza, 157 Wn.2d 582, 584, 141 P.3d 49 (2006). Having waived his right to appeal on this basis more than 25 years ago, he should not now be allowed to resurrect it herein.

D. THE APPELLANT'S CLAIM OF A COURTROOM CLOSURE UTTERLY LACKS ANY SUPPORT IN THE RECORD SO AS TO PERMIT REVIEW HEREIN.

The Appellant's final claim is that his arraignment was not conducted in public. Appellant's Opening Brief, page 9. This is truly a "new" claim in this case, rather than a rehash of arguments rejected by this Court in its 1992 decision. However, as with all of the prior assignments of error the Appellant offers no explanation why this issue could not have been raised in the prior appeal.

As for the argument itself, while the Appellant provides an impressive and exhaustive recitation of the law on open courts and public trial, he does not even pretend that there is a scintilla of evidence to support this claim. It is a well-worn rule that on appeal the Court may only consider facts contained in the record. State v. Wilson, 75 Wn.2d 329, 332, 450 P.2d 971 (1969). Further:

> If a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition, which may be filed concurrently with the direct appeal.

State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). The Appellant has not done so. This precludes consideration of this utterly unsupported claim.

Beyond this, when a defendant asserts a violation of his public trial rights, he bears the burden of demonstrating that a "closure" actually occurred. State v. Njonge, 181 Wn.2d 546, 556, 334 P.3d

1068 (2014). The Appellant herein makes no effort to carry this burden. Having failed to establish that his arraignment was not conducted in an open and public setting the inquiry can go no further:

> On a partial or incomplete record, the appellate court will presume any conceivable state of facts within the scope of the pleadings and not inconsistent with the record which will sustain and support the ruling or decision complained of; but it will not, for the purpose of finding reversible error, presume the existence of facts as to which the record is silent.

State v. Jasper, 174 Wn.2d 96, 121-24, 271 P.3d 876 (2012). The Appellant's complaints about an incomplete record aside, there is not even a scintilla of evidence of any closure of the courtroom in any of the proceedings below. The Appellant should not be allowed to conjure such from nothing.

IV. CONCLUSION

All of the issues raised by the Appellant herein are subject to a bar based upon *res judicata* and the "law of the case." This Court should conclusively rule that all of the Appellant's arguments either were or should have been raised in the initial appeal decided over twenty-five years ago. The Appellant does not offer any explanation why the Court should allow him to re-litigate these matters in the present setting.

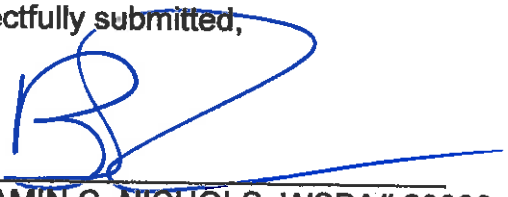
As for the specifics of the assignments of error, the Appellant's assertion that his plea of guilty was invalid due to the trial court's

failure to advise him of the possibility of discretionary community supervision is not supported in the law. His claim that the plea agreement in this matter was invalid due to the failure of consideration has been considered on its merits and denied in the prior appeal. The trial court's misstatement of the applicable standard range was corrected prior to sentencing and the Appellant waived any right to appeal on this issue. Finally, the Appellant's bald assertion that his arraignment was not conducted in public lacks any support in the record. His failure to provide any factual support not only precludes review but demonstrates an inability to carry the burden of proving that any closure occurred.

Based upon the foregoing the Court should reject all of the Appellant's claims and affirm the Judgment and Sentence entered in this matter.

Dated this 8th day of September, 2017.

Respectfully submitted,



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COURT OF APPEALS OF THE STATE OF WASHINGTON - DIVISION III

THE STATE OF WASHINGTON, Respondent, v. KYLE JOHNSON, Appellant.	Court of Appeals No: 34605-6-III **DECLARATION OF SERVICE**

DECLARATION

On September 8, 2017 I electronically mailed, through the portal, a copy of the BRIEF OF RESPONDENT in this matter to:

JEFFREY ERWIN ELLIS
JEFFREYERWINELLIS@GMAIL.COM

I declare under penalty of perjury under the laws of the State of Washington the foregoing statement is true and correct.

Signed at Asotin, Washington on September 8, 2017.

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ASOTIN COUNTY PROSECUTOR'S OFFICE

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